SC92500

IN THE SUPREME COURT OF MISSOURI

PEGGY NORTHCOTT AND LARRY POTASHNICK,

Respondents/Cross-Appellants,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Respondent--Appellant/Cross-Respondents.

Appeal from the Circuit Court of Cole County
The Honorable Daniel R. Green

REPLY BRIEF OF CARNAHAN AND SCHWEICH AND SECOND BRIEF OF SCHWEICH

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I. The Secretary's Summary Statement is Fair and Sufficient In Accordance With Controlling Standards.

There is no dispute that a ballot title can be challenged as "insufficient or unfair." § 116.190, RSMo (2011 Cum. Supp.). From this undisputed starting point, however, Plaintiffs generate an entirely new standard claiming that the summary statement is "insufficient or unfair" if it fails to contain "main points." Which begs the questions, what "main points," and according to whom? The trial court ventured even further down this slippery slope, finding a supposed need for a summary statement to include any "material change," or "material and substantive" changes. Judgment, pp. 3-4.

More dramatic still, Plaintiffs and the trial court are attempting to turn a purely legal question – comparing a proposed amendment to the law with a summary of the proposed amendment – into a supposed fact question requiring evidence and expert testimony. *See* Respondents' Br. pp 27-28 (*Northcott*), p. 25 (*Reuter*), pp. 75-76 (*Prentzler*), p. 95 (*Francis*) (noting that the trial court reached the decision and was "well supported by the evidence" after considering "evidence of the language" and "testimony from expert witnesses"). These are not the appropriate standards for a ballot title.

This Court established the controlling test for a ballot title in *United Gamefowl Breeders Assoc. of Mo. v. Nixon*, 19 S.W.3d 137, 140 (Mo. banc 2000). A ballot title "is not 'insufficient or unfair'" under § 116.190.3 if it "makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal." *Id.* at 140. Plaintiffs repudiate this standard in a section of their brief titled: "Notice is not the standard." But in fact, the controlling test provided by this Court, unlike the more intrusive versions espoused by the Plaintiffs and trial court, gives the kind of deference repeatedly emphasized: "When courts are called upon to intervene in the initiative process, they must act with restraint [and] trepidation . . . ." *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006). Furthermore, the notice based standard recognizes that a summary statement is not required to be the most specific summary as the Secretary is limited to 100 words regardless of the size or complexity of the initiative petition.

Plaintiffs also unwittingly suggest a standard that quite aptly describes the appropriate deference a court should give to the Secretary's summary statement when reviewing for insufficiency or unfairness – discretion. According to Plaintiffs, as long as the Secretary properly exercises her discretion then a court can do nothing but certify the summary statement as written. "Discretion," of course, contemplates a range of choices, all of which

may be upheld as within the discretion. This type of deference is consistent with the cases that have repeatedly held that "[i]f charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008).

Here, the Secretary could have used many different words and many different arrangements of words to write a summary of the initiative petition so that it "makes the subject evident with sufficient clearness to give notice of the purpose." *United Gamefowl Breeders Assoc. of Mo.*, 19 S.W.3d at 140. The subject of the initiative petition in this case is clear – to prevent lenders "from charging excessive fees and interest rates." (LF LF P28; N25; F26; R123). The Secretary's summary statement makes this subject evident with sufficient clearness, and thereby gives notice of the purpose by providing that the amendment would "limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit." (LF LF P49; N44; F50; R15).

More specificity – such as the exact interest rate – is not required. *See Missourians Against Human Cloning*, 190 S.W.3d at 456 ("Even if [a plaintiffs'] substitute language would provide more specificity and accuracy

in the summary 'and even if that level of specificity might be preferable' " this is not the test.). Indeed, a more general statement of the limit on interest rates is certainly within the discretionary choices available to the Secretary.[1/]

The Secretary provided a summary statement in this case that is less than 100 words, makes the subject evident with sufficient clearness to give notice of the purpose, and is fair and sufficient. Accordingly, the trial court should be reversed.

[1/] Plaintiffs also mention in passing that the trial court made an additional change – without explanation – by replacing the word "limit" with "allow." There was, as Plaintiffs acknowledge, no basis for this change, and it actually turns the provision upside-down. Instead of communicating an attempt to rein in "triple-digit interest rates," as described in the proposed amendment, the trial court's change gives the impression that lenders are permissively granted additional authority to charge interest. Further, the only specific limit, except as agreed to by the parties, is for loans under § 408.500 and § 408.505, and that limit is not an annual limit but for the term of the loan. This change, like all of the trial court's changes, should be reversed.

II. A Court Does Not Have Authority to Exercise Discretion in Choosing Its Preferred Language for a Summary Statement.

Curiously, Plaintiffs all but concede that the trial court does not have authority to re-write ballot summary language. First, there is no denying that neither the Constitution nor any statute gives courts the authority to rewrite ballot summary language. Plaintiffs can cite no provision to support such authority. Second, Plaintiffs acknowledge that it is "abundantly clear that a trial court does not have the authority to completely rewrite a summary statement." Respondents' Br. p. 40 (*Northcott*), p. 38 (*Reuter*), p. 88 (*Prentzler*), p. 106 (*Francis*). And so the question must be asked, what is the difference between completely rewriting a summary statement and what the trial court did in this case. Nothing.

According to Plaintiffs, the trial court believed that the summary statement prepared by the Secretary did not include what it thought were the "main points" or "material and substantive" changes. The trial court then substituted its judgment for the Secretary and rewrote the summary statement. That certainly sounds like a complete rewriting, regardless of the number of words changed.

The problem is that the positions advocated by the Plaintiffs and the trial court are irreconcilable – something cannot be "insufficient and unfair"

and then not constitute a complete rewriting in order to fix it. Moreover, if the Secretary's drafting of the summary statement is discretionary, which it is, then a court's redrafting of the summary statement is its own exercise of discretion. Indeed, many different ways of writing a summary statement are permissible and by taking that decision away from the Secretary the courts are usurping the discretion of the Secretary in violation of separation of powers. *See State ex rel. Mo. Highway Transp. Comm'n v. Pruneau*, 652 S.W.2d 281, 289 (Mo. App. S.D. 1983) (finding that courts may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where the law vests such right to exercise discretion with the executive branch of government). Thus, even if the summary statement in this case were insufficient and unfair, which it is not, it is the Secretary, not the courts, that should rewrite the summary statement.

III. The Auditor Did Not Abandon the Argument That the Fiscal Note and Fiscal Note Summary are Sufficient and Fair With Regards to the Initiative Petition's Impact on Local Governmental Entities.

Plaintiffs assert that the Auditor has abandoned his appeal on fiscal note issues since he allegedly did not challenge that part of the trial court's

decision finding the Auditor failed to consider local impact of the proposed initiative petition. This argument is without merit.

Plaintiffs are distorting the judgment when they claim the trial court based its decision on the Auditor's alleged failure to consider local impact of the measure since the trial court clearly based its decision on the alleged failure of the Auditor to consider the *effect of 510s*[2] *on state and local government.* The trial court did not base its decision on a failure of the Auditor to consider the local impact of the measure because the record undisputedly shows that the Auditor did consider local impact based on information provided to him at the time he prepared the fiscal note and fiscal note summary.

Plaintiffs argue in their response briefs that part of the trial court's ruling on the sufficiency and fairness has been abandoned by the Auditor. They assert that the court order was based on two separate issues (1) failure to consider 510s and (2) impact on local entities. This reading of the order is incorrect and totally contrary to the evidence on the record. The court made it abundantly clear that the sole basis of the order was "[t]hat it is the complete omission of any fiscal impact that the initiative would have on the '510' lenders that renders the fiscal note and summary defective." Judgment, p. 7, fn. 1 (Reuter LF 156-163; Francis LF 199-206; Prentzler LF 202-209; and

[2/] "510s" refers to business entities covered by § 408.510.

Northcott LF 287-294). Thus, the entirety of the language in the order has to be read in this context, that the court based his ruling on his finding that 510s were not considered for fiscal impact on either the state or local governmental levels. This is the correct reading of the order for several reasons.

First, the record shows absolutely no argument in the trial court by counsel for any of the Plaintiffs that the Auditor did not consider any fiscal impact information regarding local governmental entities. In fact, questioning by various Plaintiffs' attorneys acknowledged there was fiscal impact information from local governmental bodies in the fiscal note and that input summarized, along with the rest of the fiscal note, in arriving at the part of the fiscal note summary referring to impact on local governmental bodies. (Tr. 13, 18, 23-24, 31-32, 46, 49, 51-52, 68-70, 74, 79-80, 81, 90, 95, 107).[3/]

The fact that the Auditor did receive and follow up on fiscal impact information from local government entities is acknowledged by one of the attorneys for the various plaintiffs during questioning of the Auditor's employee who drafted the fiscal note summary: "Q: [Mr. Greim] The only

[3/] All transcript references are to the trial transcript of March 27, 2012.

other point where I saw that you did some independent investigation was with respect to the local government issue…" (Tr. 107).

Second, the trial court never raised this as one of his concerns expressed at the end of the trial (Tr. 249). This is due to the fact that the trial transcript and J. Ex. 3 conclusively show that fiscal impact information from local governmental entities was sought, received and reflected in the fiscal note and fiscal note summary. (*See* J. Ex. 3; Tr. 13, 18, 23-24, 31-32, 46, 49, 51-52, 68-70, 74, 79-80, 81, 90, 95, 107).

Third, a proper reading of the full judgment (Reuter LF 156-163; Francis LF 199-206; Prentzler LF 202-209; and Northcott LF 287-294) shows that the focus, then, of the trial court's ruling is on the alleged lack of consideration of the impact of lost state (Tr. 188-192, 196-197) and local revenue (Tr. 199-204) due to the effect of the measure on 510s. This is further supported by the following exchange between an attorney for one of the Plaintiffs and Dr. Durkin at trial:

> Q: Did you see anything in the fiscal note or fiscal note summary related to impact on the 510 lenders in Missouri?
>
> A: Yea, there was something there on the last page that indicates that, I think, maybe half of them

maybe go out of business or something to that effect. That's been discussed this morning.

Q: Did you see any analysis-

A: No, no analysis that I saw of what the impact on 510 lenders on revenues that arise from the 510 lending industry might be.

Q: With the fiscal note and fiscal note summary not including that impact to 510 lenders and what that impact on state government would be and local government would be, and with the unemployment-

A: Basically not there, yeah.

(Tr. 204:1-16).

Dr. Durkin's testimony provides the only support for the argument that the fiscal note and fiscal note summary are inadequate for failure to consider the impact of lost 510 revenue to state and local governmental entities. As we argued in our original brief, Durkin's testimony should not have been considered on the issue of 510s at all and the fiscal note and fiscal note summary are sufficient and fair based on the information the Auditor had available when he developed the fiscal note and fiscal note summary. To quote from our summary of argument in our initial brief in this case:

First, Section 116.175, RSMo, and current case law out of the Western District Court of Appeals strongly support the logical position that the sufficiency and fairness of the fiscal note is to be judged on the basis of the information provided to the Auditor during the twenty day window he has to prepare a fiscal note, and only that information. To require otherwise invites mischief and delay in the initiative process moving forward in an orderly fashion because opponents of an initiative petition could withhold fiscal information from the Auditor only to present it later at trial. That is what occurred in this case when Plaintiffs put on Dr. Thomas Durkin at trial to render his opinion about the alleged impact of the initiative petition on installment lenders defined under Section 408.510, RSMo. Dr. Durkin's opinion on fiscal impact had not been presented to the Auditor during the preparation of the fiscal note. The trial court incorrectly applied the law by considering and giving weight to Dr. Durkin's

> testimony on the issue of the sufficiency and fairness of the fiscal note and fiscal note summary.

Brief of Appellants Carnahan and Schweich, p. 17. Our initial brief (Points III, IV and V) does encompass the totality of the trial court's ruling on the sufficiency and fairness of the fiscal note and fiscal note summary.

IV. Plaintiffs Have Two Forums to Impact the Sufficiency and Fairness of a Fiscal Note: (1) by Submitting a Statement of Fiscal Impact as Allowed by § 116.175, and (2) by Filing a Lawsuit Challenging the Sufficiency and Fairness of the Fiscal Note and Fiscal Note Summary.

Section 116.190, RSMo, governs review by a trial court of the fiscal note and fiscal note summary prepared by the Auditor. It is clear from a reading of § 116.190 and § 116.175 that the trial court's role consists of (1) reviewing the fiscal note to ensure that it sufficiently and fairly describes fiscal impact information the Auditor receives during the twenty-day window he has to prepare the note and (2) reviewing the fiscal note summary to ensure it sufficiently and fairly summarizes (synopsizes) the fiscal note. This is the tenor of the statutes and appellate decisions, including the *Missouri Municipal League* cases. *See Missouri Municipal League v. Carnahan,* __S.W.3d__, 2011 WL 3925612 (Mo. App. W.D. 2011); *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573 (Mo. App. W.D. 2010).

This type of review is logical. It is similar to trial court review of an administrative agency's decision (*i.e.*, is the agency's decision supported by the record that was before it at the time of the decision) or appellate review of a trial court's decision (*i.e.*, does the record the trial court had available at the time she heard the case support her decision). Plaintiffs' proposed standard of review allowing the fiscal note and fiscal note summary to be judged on the basis of information not before the Auditor at the time he prepares them is not supported by statute nor by any judicial review that is analogous (*e.g.*, trial court review of an administrative agency's decision or appellate review of a trial court decision).

In summary, opponents of a measure, such as Plaintiffs, have two forums to impact the sufficiency and fairness of a fiscal note and fiscal note summary. First, by submitting information to the Auditor as allowed under § 116.175.1. Second, by filing a lawsuit under § 116.190, and challenging (1) the sufficiency and fairness of the fiscal note by showing that the fiscal impact information received by the Auditor (during the twenty-day window allowed by § 116.175) was not adequately and fairly summarized in the fiscal note and/or (2) the sufficiency and fairness of the fiscal note summary by showing that the Auditor did not adequately and fairly synopsize the information contained in the fiscal note.

* * *

SECOND BRIEF OF AUDITOR SCHWEICH

SUMMARY OF THE ARGUMENT

The law imposes a heavy burden on Plaintiffs as the statute's constitutional challengers. Their argument takes such a strained reading of the constitutional provision as to require that all doubts be resolved in his favor rather than the statute. Plaintiffs' proposed construction of Art. IV, § 13, moreover, would call into question literally dozens of functions that the Auditor has carried on for many years. This Court should not permit those who oppose a ballot initiative on its merits to prevent determination of the merits at the ballot box rather than in the courtroom.

The Auditor believes that § 116.175 does not violate the last sentence of Art. IV, § 13. To reach the conclusion claimed by Plaintiffs, the Court must ignore the words *"and investigations required by law*" from the third sentence of § 13. In fact, those words are never mentioned in the discussion and analysis of Plaintiffs' brief. But it is a maxim of construction that all words must be given some meaning and equally that words are to be given their plain and ordinary meaning. *Johnson v. State*, --- S.W.3d ----, May 25, 2012 (SC92351).

Plaintiffs likely will take the position that an "investigation" as used in the statute merely means the collecting and evaluation (or assessment) of information done at the same time and as part of an audit. But the people

need not have adopted the phrase "*and investigations as required by law"* if the Constitution is read as narrowly as Plaintiffs request. The collection and evaluation of information (an "investigation") is an inherent part of any audit. The italicized phrase must mean something else. Plaintiffs' argument renders that language in the Constitution meaningless. Interpreting that phrase to read "investigations as required by law. . . relating to the receipt and expenditure of public funds" gives meaning to the phrase "investigations as required by law." An example of the application of this reading is in § 137.073.6(2), which requires every county clerk for each taxing authority in their county to forward for review and approval the proposed tax rate for the upcoming year to determine if it complies with the taxing district's tax ceiling.

The Auditor has never contended that the last sentence of § 13 is not a limitation. And the Auditor agrees that the sentence limits "investigations as required by law" to those "related to the supervising and auditing of the receipt and expenditure of public funds." The collection of information concerning the potential fiscal impact of a proposed initiative petition is related to the "receipt" of public funds in this case and "expenditure" of public funds in others. Section 13 does not contain any language that suggests that "audit" means only "post-audit."

Alternatively, even if the Court finds § 116.175 to be unconstitutional (and assuming that the Court rejects the sufficiency issues raised by Plaintiff) there is no credible or legally logical argument that the electorate should be deprived of their franchise because of either the absence of a fiscal note or the identity of the drafter of a legally sufficient fiscal note. Nor do Plaintiffs even attempt such an argument. The judicial branch, that is the most protective of the right to vote, should not become complicit with delaying and obstructive tactics by those that fear the electorate's decision.

I. Section 116.175 Does Not Conflict With Art. IV, § 13 of the Missouri Constitution Because the Constitution Permits the Legislature to Assign Investigations to the Auditor that Relate to the Receipt and Expenditure of Public Funds. – Responding to Cross-Appellants' Point I.

The Auditor has never claimed that the preparation of fiscal notes or fiscal note summaries is part of an audit. Nor has the Auditor claimed that the last sentence of Art. IV, § 13 is not a limitation on the ability of the legislature to impose duties on the Auditor. Much of Plaintiffs' brief is, therefore, simply irrelevant to the issues in this case. Rather, the issue is how strictly those limitations of legislative authority are to be read and whether Plaintiffs' proposed reading is either logical or consistent with

principles of constitutional construction. Plaintiffs narrowly frame the question as whether Art. IV, § 13 expressly permits the legislature to require the Auditor to prepare fiscal notes and fiscal note summaries, but the more precise question is whether the Constitution prohibits that legislative assignment. *Farmer v. Kinder,* 89 S.W.3d 447 (Mo. banc 2002).

In effect, Plaintiffs argue that the limiting clause is much more. That it is the empowering clause as well, thus strictly limiting the legislature's authority to requiring duties only related to auditing. Plaintiffs rewrite § 13 in two ways. First, they would read the specific enumeration of the Auditor's powers in Art. IV, § 13 to either eliminate the word "investigations" or make it redundant. Finally, they ignore the word "supervising" of the "receipt and expenditure of public funds" so as to limit the Auditor's duty only to those relating to auditing of the receipt and expenditure of public funds.

The term "investigations" is not a term of art as used in the Constitution. Art. IV, § 13 explicitly provides that investigations can be assigned to the Auditor by the General Assembly. Investigations related to the receipt and expenditure of public funds are naturally related and associated with preparation of fiscal notes and fiscal note summaries of the fiscal impact of a proposed initiative. A fiscal note summary is intended to advise the voters about the potential cost or savings, if any, from adoption of the initiative.

Most importantly, Plaintiffs' argument violates rules of constitutional construction because it gives no meaning to the phrase "not related." And yet, it would grant virtual free license to the legislature to assign to the Auditor duties of "investigations" without any limiting language. As long as some assignment fell within the scope of "investigations" it would be within the Auditor's constitutional powers.

But by including the phrase "related to" the constitutional duties the people imposed a limitation on the scope of investigations by the Auditor and any other duties to those "related to the receipt and expenditure of public funds." "Related to" in its normal usage means "to show or establish a logical or causal connection between." Webster's Third New International Dictionary 1916 (1993). The question thus posited is whether preparation of a fiscal note is an investigation connected or associated with "the receipt and expenditure of public funds." There should be no serious argument that costs to government are not connected to expenditures of public funds. Expenditures are costs.

Plaintiffs would have this Court conclude that audits of the receipt and expenditure of public funds are the constitutional limit of the Auditor's powers. But Art. IV, § 13 itself belies that contention. In addition to audits, the Constitution includes in the Auditor's duties establishing accounting systems for all public officials of the state, investigations as provided by law

and accounting and budgeting systems of political subdivisions. A fair reading of Art. IV, § 13 in its entirety must conclude that the people, when adopting the Constitution, must have envisaged that the legislature should be able to assign some duties to the Auditor beyond post-audits and establishing accounting and budgeting systems.

The fiscal note and fiscal note summary's contents are established in § 116.175.3. "The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities." The statute also specifies that proponents and opponents of a measure may submit proposed statements of fiscal impact to the Auditor for inclusion in the fiscal note and assessment process as the Auditor prepares the fiscal note and fiscal note summary.

Plaintiffs expend much of their argument criticizing the way the Auditor prepares fiscal notes. But that argument has nothing to do with the constitutionality of § 116.175 unless Plaintiffs would concede that an independent assessment of fiscal impact would fall within the subject of an "investigation" under Art. IV, § 13. The standards and procedures the Auditor consisted of gathering of information (investigation) of potential impact from those likely to be effected by the initiative as well as its opponents and proponents. Section 116.175 does not require the Auditor to

independently assess the fiscal impact of a proposed initiative. *MML I,* 303 S.W.3d at 582.

The Auditor does no analysis or evaluation of the correctness of the proposed impact statements, but only reviews for reasonableness and completeness. *Id*. The summary is by necessity a compilation of the various proposals which in 50 words is to summarize the various proposals, if you will, from high to low. The legislature labored under no fiction that the fiscal note and fiscal note summary would meet some standard of accuracy as it made the submission of proposals to the Auditor voluntarily and only allowed ten days for their submission by proponents and opponents and twenty days for the Auditor's transmittal to the Attorney General. It is an "investigation" that is "related to the receipt and expenditure of public funds" and is, therefore, not prohibited by the Constitution.

II. Even if This Court Agrees with Plaintiffs' Constitutional Claims, it Should Order the Initiative Placed on the Ballot With the Fiscal Note or Alternatively Order the Initiative Placed on the Ballot Without a Fiscal Note.

Plaintiffs fail to discuss at all whether the proper remedy, if § 116.175 is unconstitutional, is the drastic measure of barring the initiative from the ballot. The Constitution prescribes no penalty for the Auditor's performance of an act beyond the scope of Art. IV, § 13 and it is unreasonable and

unnecessary to restrict the constitutional right of the people to initiative by directing that an initiative proposal cannot be voted on because an unauthorized person prepared an otherwise sufficient fiscal note and fiscal note summary. The Constitution does not require *any* fiscal note and fiscal note summary.

The legislative goal in requiring a fiscal note and fiscal note summary is to give voters some information about potential effects of an initiative on cost or savings of a proposed initiative. That salutary goal is satisfied, no matter who prepares the fiscal note and fiscal note summary. The court's determination that the legislature could not require the Auditor to prepare that information should not invalidate the initiative itself.

Until 1997, the salutary purpose of fiscal notes and fiscal note summaries for initiatives, referendums and proposed constitutional amendments was conducted by the Oversight Division of the Committee on Legislative Research. These duties were imposed on the Auditor after this Court held that the statute requiring fiscal note summaries to be prepared by that Committee concerning initiative provisions was unconstitutional. *Thompson v. Committee on Legislative Research,* 932 S.W.2d 392, 395 (Mo. banc 1996).

Faced with a dilemma of initiative proposals being placed on the ballot with no fiscal impact information or being potentially ineligible for placement

on the ballot because of the lack of the statutorily required fiscal note and fiscal note summary, the legislature considered its options. Placing the duties on the Secretary of State was not practical since the Secretary already prepared ballot summaries and Art. IV, § 14, Mo. Const. provides "[n]o duty shall be imposed on him by law which is not related to [his duties as prescribed in this constitution]." The Constitution likewise provides "[n]o duty shall be imposed on the State Treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds…." Art. IV, § 15, Mo. Const. The Attorney General would not be a proper choice since he was already charged with the responsibility of approving the content and form of both the ballot summary and the fiscal note summary before certification by the Secretary of the State. Placement of the responsibility in the Governor's office or an executive branch agency controlled by him was likely neither a palatable or desirable choice.

The State Auditor was not only a practical and logical choice, but undoubtedly appeared to the legislature to fall within the parameters of the Auditor's constitutional authority because the fiscal impact of initiative petitions seems logically connected to investigations of fiscal matters and the receipt and expenditure of public funds.

By a 1908 amendment to the 1875 Missouri Constitution, the people of Missouri reserved to themselves the rights of referendum and initiative. An

outgrowth of the Populist movement, referendum and initiative reflect a special power of the people to self-govern. Of course, the Missouri Constitution, then and now, only established the right, as it did with many other rights (such as the right to suffrage guaranteed by Art. I, § 25). Protection of those rights and their implementation necessarily and forseeably required that rules and procedures be established by the legislative branch.

Our courts have long recognized that the constitutional right of an initiative should have as few obstacles and impediments as possible. "Because the right of initiative is firmly grounded in our constitution, the courts of Missouri have established a pattern of allowing substantial latitude with regard to the technicalities of seeking to place an initiative measure on the ballot." *Missourians Against Human Cloning,* 190 S.W.3d at 459 (Smart, J. concurring in part and dissenting in part). As a consequence, statutes may not limit or restrict the right to initiative. *State ex rel. Elsas v. Mo. Workmen's Comp. Comm.*, 2 S.W.2d 796, 801 (Mo. banc 1928). This Court cast the principle in another way in *Missourians to Protect the Initiative Process,* 799 S.W.2d 824, 827 (Mo. banc 1990). Before the people vote on an initiative, courts may consider only those threshold issues that *affect the integrity of the election* itself and that are so clear as to constitute a matter of form. (emphasis added).

The requirement of a fiscal note and fiscal note summary as part of the initiative process (as well as legislation in the General Assembly) arises from statute, not the Constitution. The identity of the author of a fiscal note and fiscal note summary does not call into question the integrity of the election. A few years after *Missourians to Protect the Initiative Process,* this Court reaffirmed that its paramount concern is determining whether or not the statute makes an irregularity fatal. *Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 509 (Mo. banc 2006). The statute governing fiscal notes specifies no penalty for an irregularity in the preparation of a fiscal note. The *Committee for a Healthy Future* reiterated a long-standing principle "that courts will not be astute to make it fatal by judicial construction." *Id.*

In *Thompson,* this Court ordered that the proposed initiative be placed on the ballot without a fiscal note. 932 S.W.2d at 395-396. Plaintiffs present no sound argument for the Court to overturn that precedent. If the Court believes that § 116.175 is unconstitutional, it should order the same relief herein. Alternatively, if, on the merits, the Court finds the fiscal note and fiscal note summary to be sufficient, it should place this measure on the ballot with the fiscal note as prepared.

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment holding the Secretary of State's summary statement insufficient and unfair, and then judicially re-writing the summary statement, should be reversed. Similarly, the Circuit Court's judgment holding the Auditor's fiscal note and fiscal note summary insufficient and unfair should be reversed. Finally, the Circuit Court's judgment rejecting the Plaintiffs' constitutional challenge to the Auditor's authority to prepare fiscal notes and fiscal note summaries should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on June 20, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,900 words.

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